IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1979

NO. 79-324

ESTATE OF W.T. GRANT COMPANY (BANKRUPT),

Appellants,

v.

GERALD A. LEWIS, Comptroller of the State of Florida, D. ROBERT GRAHAM, Governor, JIM SMITH, Attorney General, GERALD A. LEWIS, Comptroller, DOYLE CONNER, Commissioner of Agriculture, WILLIAM GUNTER, Treasurer, RALPH D. TURLINGTON, Commissioner of Education, and the Governor and Cabinet as head of the Department of Revenue; and THE DEPARTMENT OF REVENUE, State of Florida,

Appellees.

MOTION TO DISMISS OR AFFIRM

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Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Florida on the ground that the questions on which this appeal depends are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

A. STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND THE NATURE OF THE CASE.

The State of Florida, like many other jurisdictions, imposes a sales tax on the privilege of engaging in various commercial transactions within its borders. This tax is imposed in Ch. 212, F.S. Section 212.05, F.S., imposes a tax on the privilege of engaging in the business of selling tangible personal property in the State of Florida. Subsection (1)(a) of Sec. 212.05, supra, levies a tax at the rate of four percent of the sales price of each item of tangible personal property sold in the state. As the Florida First District Court of Appeal pointed out below, Sec. 212.02(4), F.S., defines the term "sales price" as used in Ch. 212, F.S., to include ". . . the total amount paid for tangible personal property,

including . . . any amount for which credit is given the purchaser by the seller. . . ." Estate of W.T. Grant Co. v. Lewis, 358 So.2d 76, 79 (Fla. 1st DCA 1978). Along the same line, Sec. 212.06(1)(a), F.S., makes it clear that on credit sales, tax must be paid on the full amount of the purchase price at the time of the sale:

> The full amount of the tax on credit sales, installment sales, and sales made on any kind of deferred payment plan shall be due at the moment of the transaction in the same manner as a cash sale.

Thus, it is clear that under the Florida sales tax structure, the privilege of selling tangible personal property at retail in the state is taxed measured by the full sales price, including any amounts for which credit is extended to the purchaser by the seller.

The sales tax imposed by Ch. 212, F.S., is an excise tax imposed on the exercise of various commercial privileges

in the state, as construed by the Florida Supreme Court. Gauldin v. Kirk, 47 So.2d 567 (Fla. 1950). It is not an ad valorem or property tax, id, at 47 So.2d 574. It is placed under the administration of the Department of Revenue of the State of Florida (see Sec. 213.05, F.S.), the head of which is the Governor and Cabinet of the State of Florida. Section 20.21, F.S. The Department is charged with paying all sales taxes collected into the General Revenue Fund of the State of Florida. Section 212.20, F.S. The Department of Revenue, however, has no power or authority to draw money out of the State Treasury, including the General Revenue Fund.

The Constitution of the State of Florida, and specifically Art. IV, Sec. 4(d) thereof, gives the Comptroller of the State of Florida, presently the Hon. Gerald A. Lewis, the authority and responsibility to settle all

accounts against the State of Florida. Implementing this constitutional provision in part, Sec. 215.26, F.S., gives the Comptroller of the State of Florida the power to make tax refunds upon a showing by the taxpayer of any of three situations: (1) an overpayment of tax, (2) a payment where no tax is due, and (3) any payment made into the State Treasury in error. The Florida appellate court and Supreme Court below have held that where none of these three situations prevails, there is no statutory right to a tax refund. State ex rel. Brunswick Corporation v. Kirk, 204 So.2d 4 (Fla. 1967) and State ex rel. Victor Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954) out of the Florida Supreme Court are of the same accord.

Where sales made in the State of Florida on which sales tax has been paid prove uncollectible, Sec. 212.17(3), F.S.

1975, 1977, allows the seller to claim a credit or setoff against future tax liability in the amount of four percent of the uncollectible account on future returns the seller files with the Department of Revenue. The language of this statute clearly contains nothing allowing a refund to the seller where an account becomes uncollectible. In the proceedings below, the Florida Supreme Court and First District Court of Appeal found no language in Sec. 212.17(3), supra, which conferred a right to a tax refund, even in situations where the seller has insufficient future sales tax liabilities to claim the full amount of the credit due on its uncollectible accounts.

B. PROCEEDINGS BELOW

On March 29, 1977, Grant requested a refund of $520,060.00 in Florida sales tax, pursuant to the provisions of Sec. 215.26. The application stated as the

ground for the requested refund an "overpayment of Florida's sales tax in the amount of §520,060.00." The refund application stated that Grant had made numerous "sales" pursuant to several different types of credit plan, with the tax collected on the credit sale "at the time the sale was made." The application stated that many of the accounts receivable generated by the credit sales were later found to be uncollectible and were therefore written off the company's books, but that, because of Grant's adjudication as a bankrupt, the bad debts could no longer be offset or credited against future retail sales.

On April 15, 1977, the Comptroller of the State of Florida notified Grant that it would deny the refund claim based on an audit and recommendation from the Department of Revenue for denial of the

claim because a refund was not authorized by Sec. 212.17(3), F.S. Thereafter, Grant requested a rehearing, asserting both Secs. 212.17(3) and 215.26, F.S., 1975, as authority for a refund. The Department of Revenue denied this request on behalf of the Comptroller, which denial was later confirmed by notification from the Comptroller.

Under the provisions of Sec. 120.68, F.S., 1975, 1977, Grant petitioned the District Court of Florida to review the administrative actions of the Comptroller and Department of Revenue. The District Court of Appeal concluded that the agencies had properly denied Grant's refund request and dismissed the petition. Estate of W.T. Grant Co. v. Lewis, 358 So.2d 76 (Fla. 1st DCA 1978). Grant appealed to the Florida Supreme Court, which affirmed the First District Court of Appeal.

Estate of W.T. Grant Co. v. Lewis, 370 So.2d 764 (Fla. 1979).

ARGUMENT

THIS APPEAL RAISES NO SUBSTANTIAL FEDERAL QUESTION

Grant's jurisdictional statement filed in this Court raises two questions which Grant asserts warrant this Court to take jurisdiction. It is the position of the Appellees that neither of these questions, as framed herein, is sufficiently substantial to justify this Court in taking jurisdiction.

Grant's first contention is that it is denied due process and equal protection of the laws. It appears, however, that Grant's primary concern is with an alleged denial of equal protection. It is alleged that the bankrupt is singled out for a denial of the economic benefit accorded to all other retail merchants because it alone is unable to claim the benefit of

the credit provision of Sec. 212.17, F.S., Grant cites specifically to this Court's decisions in Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1934, 40 L.Ed.2d 189 (1974) and Allied Stores of Ohio v. Bowers, 385 U.S. 522, 2 L.Ed.2d 480 (1959) as supportive of its contention.

Its reliance on these cases is misplaced. These very cases, as well as such other decisions from this Court as Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) and San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) have stressed the latitude given the states in structuring their fiscal policies so that distinctions and classifications may be drawn by a legislature in tax or other fiscal matters so long as they have a rational relationship to legitimate state purposes.

The Florida First District Court of Appeal properly disposed of Grant's argument. It noted that the transactions were fully taxable at the measure on which the tax was paid. Moreover, for all that can be told from the record, the sales were not "frustrated" or "thwarted" as Grant's statement suggests. Rather, the goods have apparently been delivered to the purchaser and Grant reimbursed through some combination of cash and an account receivable. Where the account receivable does go bad prior to being completely paid off, the Florida Legislature has apparently determined to give the taxpayer some relief, even though the full amount of tax remitted was actually due on the sale when it took place. However, it was obviously the determination of the legislature that it did not want a negative cash flow from the treasury such as would be the case if the seller had an opportunity to claim a refund.

This policy also accounts for the difference in treatment afforded in Sec. 212.17, F.S., between bad debt writeoffs, where only a credit is allowed, and returned or repossessed goods where the seller is allowed to claim a refund. In the latter two circumstances, as the District Court of Appeal pointed out, the goods are returned to the seller's inventory and are available for resale, thus having the potential to generate additional sales tax. Where the debt is simply written off without the return of the goods, no new tax can be generated.

Grant's argument that the statute discriminates against the bankrupt as opposed to those who terminate business in some other manner is speculative at best and is not supported anywhere in the record. The statute on its face is nondiscriminatory and contains no special

provisions dealing with bankrupts or those who terminate business in some other fashion. It simply provides a credit to be taken against future tax liability. This credit is similarly unavailable to any retail seller who does not have sufficient future retail sales to claim it, regardless of the reason. Indeed, it is even unavailable to a continuing business whose volume of Florida retail sales does not generate enough tax liability to absorb the credit. The argument that one who closes a business voluntarily has more latitude to plan to absorb the credit is highly speculative at best. No elaboration is given, and many of the same choices available to a voluntary dissolution of a retail business are also available to the trustee in terminating the affairs of the bankrupt. In short, the distinctions made by the statute, Sec. 212.17, F.S., clearly have a rational

relationship to legitimate state purposes.

Secondly, Grant argues that Sec. 212.17(3), F.S., conflicts with the federal bankruptcy act by "barring" it from obtaining a refund, and therefore violates the Supremacy Clause of the Federal Constitution. Initially, it must be observed that Grant has misstated the question. Strictly speaking, Sec. 212.17(3), supra, does not bar Grant from obtaining a refund. It simply does not contain any provisions allowing a refund in the circumstances in which Grant finds itself. Thus, the implication that but for this statute, Grant would be able to obtain its refund is not correct at all. If this statute did not exist, or were to be declared unconstitutional for some reason, Grant would still not be able to obtain a refund because there is no other provision of Florida law which authorizes one. Grant has identified nothing in the Bankruptcy Code which would entitle it to a refund of state taxes

which were not authorized under some principle of state law.

Grant's primary reliance is on the case of Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). This case is not on point at all. In Perez his Court struck down a provision in Arizona's motor vehicle law which suspended a driver's license and registration where there was an unsatisfied tort judgment against him arising out of an automobile accident, even though that judgment might have been discharged in bankruptcy. This Court held that one of the primary objectives of the bankruptcy act was to give the discharged debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. Since the Arizona statute constituted a strong pressure to satisfy this judgment, even though

discharged in bankrupty, if a person wished to exercise driving privileges, the statute was inconsistent with the purpose of the federal act, violating the supremacy clause.

In the present case, the State of Florida has done nothing more than deny a refund of taxes which were properly due and owing to the state in their entirety at the time they were paid. This denial, in no way frustrates the complete discharge of the bankrupt, as did the Arizona statute in Perez. It does not in any way constitute an inducement or incentive for the bankrupt to pay or discharge any liabilities which were discharged in bankruptcy. Moreover, if the business is truly bankrupt, denying it a tax refund would certainly not discourage it from entering bankruptcy. In short, there is no purpose in the bankruptcy act identified in the jurisdictional statement which is frustrated by denying Grant a refund not authorized by statute.

CONCLUSION

For the reasons set forth herein, this Court lacks jurisdiction. An order should be entered dismissing this appeal, or alternatively affirming the judgment entered herein by the Supreme Court of Florida.

Respectfully submitted,

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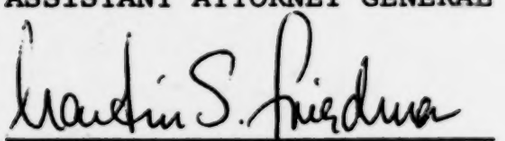

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